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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 10-00419 SI

Plaintiff,

v.

NOE EZEQUIEL CUENCA-VEGA,

Defendant.

INSTRUCTIONS TO JURY

DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law that applies to this case. A copy of these instructions will be available in the jury room for you to consult. It is your duty to weigh and to evaluate all the evidence received in the case and, in that process, to decide the facts. It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law and must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. You will recall that you took an oath promising to do so at the beginning of the case.

You must follow all these instructions and not single out some and ignore others; they are all important. Please do not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

CHARGE AGAINST DEFENDANT NOT EVIDENCE—PRESUMPTION OF INNOCENCE—BURDEN OF PROOF

The charge is not evidence. The defendant has pleaded not guilty to the charge. The defendant is presumed to be innocent unless and until the government proves the defendant guilty beyond a reasonable doubt. In addition, the defendant does not have to testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge beyond a reasonable doubt.

DEFENDANT'S DECISION NOT TO TESTIFY

A defendant in a criminal case has a constitutional right not to testify. You may not draw any inference of any kind from the fact that the defendant did not testify.

REASONABLE DOUBT—DEFINED

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on

speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

- (1) the sworn testimony of any witness;
 - (2) the exhibits received in evidence; and
 - (3) any facts to which the parties have agreed.

WHAT IS NOT EVIDENCE

In reaching your verdict you may consider only the testimony and exhibits received in evidence.

The following things are not evidence and you may not consider them in deciding what the facts are:

1. Questions, statements, objections, and arguments by the lawyers are not evidence. The lawyers are not witnesses. Although you must consider a lawyer's questions to understand the answers of a witness, the lawyer's questions are not evidence. Similarly, what the lawyers have said in their opening statements, will say in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers state them, your memory of them controls.

2. Any testimony that I have excluded, stricken, or instructed you to disregard is not evidence.
3. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as

1 testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence
2 is indirect evidence, that is, it is proof of one or more facts from which you can find another fact.

3 You are to consider both direct and circumstantial evidence. Either can be used to prove any
4 fact. The law makes no distinction between the weight to be given to either direct or circumstantial
5 evidence. It is for you to decide how much weight to give to any evidence.

6

7 CREDIBILITY OF WITNESSES

8 In deciding the facts in this case, you may have to decide which testimony to believe and which
9 testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In
10 considering the testimony of any witness, you may take into account:

- 11 (1) the witness's opportunity and ability to see or hear or know the things testified to;
- 12 (2) the witness's memory;
- 13 (3) the witness's manner while testifying;
- 14 (4) the witness's interest in the outcome of the case, if any;
- 15 (5) the witness's bias or prejudice, if any;
- 16 (6) whether other evidence contradicted the witness's testimony;
- 17 (7) the reasonableness of the witness's testimony in light of all the evidence; and
- 18 (8) any other factors that bear on believability.

19 The weight of the evidence as to a fact does not necessarily depend on the number of witnesses
20 who testify. What is important is how believable the witnesses were, and how much weight you think
21 their testimony deserves.

22

23 STATEMENTS BY DEFENDANT

24 You have heard testimony that the defendant made a statement. It is for you to decide (1)
25 whether the defendant made the statement, and (2) if so, how much weight to give to it. In making those
26 decisions, you should consider all the evidence about the statement, including the circumstances under
27 which the defendant may have made it.

28

ALIEN – REMOVED ALIEN FOUND IN UNITED STATES

The defendant is charged with being an alien who, after removal, was found in the United States in violation of Section 1326(a) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was removed from the United States;

Second, thereafter, the defendant voluntarily entered the United States;

Third, after entering the United States the defendant knew that he was in the United States and knowingly remained;

Fourth, the defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant was an alien at the time of the defendant's entry into the United States.

An alien is a person who is not a natural-born or naturalized citizen of the United States.

VOLUNTARILY ENTERED

You have heard that as an element of the crime of Removed Alien Found in the United States, the government must prove beyond a reasonable doubt that the defendant voluntarily entered the United States. You may infer that the defendant voluntarily entered the United States if you determine that the government proved that the defendant was found at a location other than a border of the United States.

REMOVED

You have heard that as an element of the crime of Removed Alien Found in the United States, the government must prove beyond a reasonable doubt that the defendant was removed from the United States. To meet its burden as to this element, the government must prove beyond a reasonable doubt that the defendant physically left the country prior to the time he was found in the United States.

KNOWINGLY—DEFINED

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

DUTY TO DELIBERATE

When you begin your deliberations, elect one member of the jury as your foreperson who will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict, whether guilty or not guilty, must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any Internet chat room, blog, website or other feature. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the

1 Internet or using other reference materials; and do not make any investigation or in any other
2 way try to learn about the case on your own.

3 The law requires these restrictions to ensure the parties have a fair trial based on the same
4 evidence that each party has had an opportunity to address. A juror who violates these restrictions
5 jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire
6 trial process to start over. If any juror is exposed to any outside information, please notify the court
7 immediately.

8

9 **USE OF NOTES**

10 Some of you have taken notes during the trial. Whether or not you took notes, you should rely
11 on your own memory of what was said. Notes are only to assist your memory. You should not be
12 overly influenced by your notes or those of your fellow jurors.

13

14 **JURY CONSIDERATION OF PUNISHMENT**

15 The punishment provided by law for this crime is for the court to decide. You may not consider
16 punishment in deciding whether the government has proved its case against the defendant beyond a
17 reasonable doubt.

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19 **VERDICT FORM**

20 A verdict form has been prepared for you. After you have reached unanimous agreement on
21 a verdict, your foreperson should complete the verdict form according to your deliberations, sign and
22 date it, and advise the clerk that you are ready to return to the courtroom.

23

24 **COMMUNICATION WITH COURT**

25 If it becomes necessary during your deliberations to communicate with me, you may send a note
26 through the clerk, signed by any one or more of you. No member of the jury should ever attempt to
27 communicate with me except by a signed writing, and I will respond to the jury concerning the case only
28 in writing or here in open court. If you send out a question, I will consult with the lawyers before

1 answering it, which may take some time. You may continue your deliberations while waiting for the
2 answer to any question. Remember that you are not to tell anyone—including me—how the jury stands,
3 numerically or otherwise, on any question submitted to you, including the question of the guilt of the
4 defendant, until after you have reached a unanimous verdict or have been discharged.

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